75-6168

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1975

LARRY ALEXANDER WADDELL,

Petitioner

v.

STATE OF NORTH CAROLINA,

Respondent

ON PETITION FOR

WRIT OF CERTIORARI TO

THE SUPREME COURT OF NORTH CAROLINA

BRIEF OF RESPONDENT, STATE OF NORTH CAROLINA IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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OPINION BELOW

The opinion of the Supreme Court of North Carolina is reported at 288 N. C. _____, 220 S.E.2d 293 (1975), and is appended to Petitioner's Petition as an Appendix, appearing at pages 5 to 20.

JURISDICTION

Presumably the Petitioner seeks to invoke the jurisdiction of this Court pursuant to 28 U.S.C. § 1257(3).

QUESTIONS PRESENTED

I

WHETHER THE TRIAL COURT DENIED PETITIONER DUE PROCESS OF LAW IN THAT PETITIONER HAD BEEN DECLARED AN OUTLAW AND IN THAT NO ORDER QUASHING THE OUTLAWRY PROCLAMATION WAS ENTERED BEFORE PETITIONER WAS PUT TO TRIAL.

II

WHETHER THE TRIAL COURT DENIED THE PETITIONER DUE PROCESS OF LAW IN EXCUSING THE VENIREMAN STITT.

III

WHETHER PETITIONER WAS DENIED DUE PROCESS OF LAW IN THAT THE TRIAL COURT FOUND THE STATE'S EVIDENCE SUFFICIENT TO SUBMIT TO THE JURY.

IV

WHETHER THE TRIAL COURT DENIED PETITIONER DUE PROCESS OF LAW WHEN IT OVERRULED PETITIONER'S OBJECTION TO QUESTIONS ASKED BY THE STATE OF PETITIONER'S WITNESSES ON CROSS-EXAMINATION.

V

WHETHER THE TRIAL COURT DENIED PETITIONER DUE PROCESS OF LAW IN REFUSING PETITIONER'S MOTION IN ARREST OF JUDGMENT, MADE ON THE GROUNDS THAT THE DEATH PENALTY IS CRUEL AND UNUSUAL PUNISHMENT, PROHIBITED BY THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Petitioner has not identified the Constitutional and statutory provisions which he seeks to invoke. Respondent, with all deference, presumes that the Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States form the basis of petitioner's request for review.

Respondent presumes that the statutory provisions which petitioner would have the Court review are:

> §14-17. Murder in the first and second degree defined; punishment. - A murder which shall be perpetrated by means of poison, lying in wait, imprisonment, starving, torture, or by any other kind of willful, deliberate and premeditated killing, or which shall be committed in the perpetration or attempt to perpetrate any arson, rape, robbery, kidnapping, burglary or other felony, shall be deemed to be murder in the first degree and shall be punished with death. All other kinds of murder shall be deemed murder in the second degree, and shall be punished by imprisonment for a term of not less than two years nor more than life imprisonment in the State's prison. (1893, cc. 85, 281; Rev., s. 3631; C.S., s. 4200; 1949, c. 299, s.1; 1973, c. 1201, s.1.)

§15-48. Outlawry for felony. - In all cases where any justice or judge of the General Court of Justice shall, on written affidavit, filed and retained by such justice or judge, receive information that a felony has been committed by any person, and that such person flees from justice, conceals himself and evades arrest and service of the usual process of law, the justice or judge is hereby empowered and required to issue proclamation against him reciting his name, if known, and thereby requiring him forthwith to surrender himself; and also empowering and requiring the sheriff of any county in the State in which such fugitive shall be to take such power with him as he shall think fit and necessary for the going in search and pursuit of, and effectually apprehending, such fugitive from justice, which proclamation shall be published at the door of the courthouse of any county in which such fugitive is supposed to lurk or conceal himself, and at such other places as the justice or judge shall direct; and if any person against whom proclamation has been thus issued continues to stay out, lurks and conceals himself, and does not immediately surrender himself, any citizen of the State may capture, arrest, and bring him to justice, and in case of flight or resistance by him, after being called on and warned to surrender, may slay him without accusation of any crime. (1866, c.62; 1868-9, c. 178, subch. 1, s.8; Code, s. 1131; Rev., s.3183; C.S., s. 4549; 1969, c. 44, s. 30; 1973, c. 1141, s. 9.)

§15-187. Death by administration of lethal gas.- Death by electrocution under sentence of law is hereby abolished and death by the administration of lethal gas substituted therefor. (1909, c. 443, s. 1; C.S., s. 4657; 1935, c. 294, s.1.)

§15-188. Manner and place of execution. - The mode of executing a death sentence must in every case be by causing the convict or felon to inhale lethal gas of sufficient quantity to cause death, and the administration of such lethal gas must be continued until such convict or felon is dead; and when any person, convict or felon shall be sentenced by any court of the State having competent jurisdiction to be so executed, such punishment shall only be inflicted within a permanent death chamber which the superintendent of the State penitentiary is hereby authorized and directed to provide within the walls of the North Carolina penitentiary at Raleigh, North Carolina. The superintendent of the State penitentiary shall also cause to be provided, in conformity with this Article and approved by the Governor and Council of State, the necessary appliances for the infliction of the punishment of death in accordance with the requirements of this Article. (1909, c. 443, s. 2; C.S., s. 4658; 1935, c. 294, s.2.)

STATEMENT OF THE CASE

Petitioner, Larry Alexander Waddell, was tried at the March 10, 1975 regular schedule "A" Session of Criminal Superior Court, in Mecklenburg County North Carolina on an indictment charging that he "did kill and murder Alma Bertram Wood...." On March 11, 1975 the jury returned a verdict finding petitioner guilty of murder in the first degree and petitioner appealed to the Supreme Court of North Carolina. In its opinion, filed December 17, 1975 the Supreme Court of North Carolina affirmed petitioner's conviction and sentence of death.

STATEMENT OF FACTS

On July 12, 1974 Mrs. Margaret Wood and her husband, Alma Bertram Wood operated a dry cleaning business in Charlotte, North Carolina (R p 55). About 6:30 p.m. the Woods closed the store for the day (R p 56). Mr. Wood had the day's receipts in a white drawstring bag (R pp 56, 57). As the Woods approached their car a man on the sidewalk said "Ha", drawing Mrs. Wood's attention (R p 56). The man had what appeared to be dirty clothes in his arms. He stepped up to Mr. Woods, threw the clothes to one side, revealing a sawed-off shotgun, said "Gimme the [money] bag," and shot (R p 56). He then fled with the money bag. The man was later identified by Mrs. Woods as the defendant, Larry Alexander Waddell (R pp 57; 62-66; 81-84). Mr. Wood died as the result of a massive shotgun wound (about three inches at the largest point) at the left base of the neck (R p 75).

ARGUMENT

The petition in this case does nothing other than restate the assignments of error argued by the present petitioner in the Supreme Court of North Carolina. Respondent is of the opinion that the Opinion of the Supreme Court of North Carolina fully, fairly and ably responds to petitioner's contentions, at least three of which do not, in our view, rise to the dignity of Constitutional questions.

THE COURT SHOULD NOT GRANT CERTIORARI TO DETERMINE WHETHER PETITIONER WAS PREJUDICED BY BEING PUT TO TRIAL, NO ORDER HAVING BEEN ENTERED QUASHING THE OUTLAWRY PROCLAMATION WHICH HAD BEEN ENTERED AGAINST HIM.

The homicide which was the subject of the present prosecution took place on July 12, 1974. On October 16, 1974 the Assistant District Attorney for the Twenty-Sixth Judicial District filed an affidavit reciting that petitioner: (1) was charged with the murder of Alma Bertram Wood; (2) was sought as a suspect in the murder of Marion Dale Kotel; (3) had been identified as a participant in an armed robbery; (4) fled from justice and concealed himself; (5) [was] "a dangerous and violent man and that he is a danger to the various citizens of the community." On the same day the Honorable Sam J. Ervin, III entered the order authorized by N. C. Gen. Stat. §15-48. Petitioner was not apprehended until November 19, 1974.

In the State Supreme Court petitioner argued that because he had been declared an outlaw and because the order proclaiming him an outlaw had not been rescinded, petitioner's status as an outlaw came to the attention of the jury. Because this information came to the attention of the jury, petitioner claimed, he had been robbed of his rights to a fair and impartial trial before an unbiased jury and his right to be presumed innocent.

The record discloses the insubstantiality of this contention. The jury was informed four times that petitioner had been declared an outlaw, and each such instance was by action of petitioner's own counsel. During the voir dire of the jury venire by petitioner's counsel the following colloquy took place between juror Broadway and counsel:

> Q. If I were to tell you that this defendant here has been declared an outlaw, prejudged by the Judge and signed an Order declaring him an outlaw and he stands now before you charged as an outlaw, would that have any effect on your verdict in the end?
> A. No, sir.
>
> Q. In other words, the fact that he has already been prejudged, so to speak, pertaining to this case, you could disabuse your mind of that and give him a fair and impartial trial?
> A. If there was a reasonable doubt, it wouldn't affect my decision.
> (R p 21-22)

Juror Broadway was passed by the State and the petitioner and sat on the jury which convicted petitioner.

The following colloquy took place between petitioner's counsel and juror Woollen, who was later excused by the Defendant:

> Q. The little bit that you read about it, did you read about him being declared an outlaw and all of that and a lot in the paper about it?
> A. No.
> (R p 25)

The narration of the testimony of R. J. Whiteside, the arresting officer, on cross-examination by petitioner's counsel discloses that he, too, was asked about the outlawry proclamation:

> I did not sign the affidavit that got Waddell declared an outlaw. I do not know who did. I knew at that time Waddell had been declared an outlaw.
> (R p 77-78)

Petitioner was asked on redirect examination, by his own counsel, about the outlawry proclamation, and petitioner made the following damaging admission:

> I knew at the time I was hiding out that I had been declared an outlaw.
> (R p 89)

In the State Supreme Court, present counsel for the State, acting as officers of the Court, admitted that the matter of outlawry, had it been brought to the attention of the jury by the State, would have afforded grounds for a new trial. The State never mentioned that matter at trial, and the Supreme Court of North Carolina correctly pointed out that any wrong done petitioner in the matter was self-inflicted.

II

THE JUROR STITT WAS PROPERLY EXCUSED FROM THE PETIT JURY.

Petitioner contended in the State Supreme Court that the trial court improperly excused the juror Stitt because of the juror's opposition to capital punishment. He further contended, without support of the record, that juror Stitt was the last black called, and that the exclusion of juror Stitt violated his right to trial by a jury of his peers.

Witherspoon v. Illinois, 391 U.S. 510 (1968) establishes (1) that veniremen may not be excluded for cause simply because they voice general objection to the death penalty or voice conscientious or religious scruples against its infliction; and, (2) that veniremen who are unwilling to consider all of the penalties provided by law and who are irrefutably committed, before the trial has begun, to vote against the death penalty regardless of the facts and circumstances that might emerge during the course of the trial may be challenged for cause on that ground. During the voir dire of this jury, the District Attorney addressed the Witherspoon questions to the panel in the box (R p 17) and seems to have gotten satisfactory answers to those questions. When petitioner asked the juror about his beliefs in capital punishment (R p 36) the juror responded that he did not believe in it. The court, acting in its proper discretion allowed the District Attorney to examine juror Stitt on his contradictory answers (R p 39). During the course of the further examination the District Attorney advised the juror at length that the sole function of the jury was to determine guilt or innocence, not the penalty (R p 41). The juror responded (R p 41):

> Q. So as I understand what you are telling me, because of your religious beliefs, even if you were satisfied that he was guilty, you could not vote to find him guilty, if you knew that the death penalty would be the results?
> A. That is just about the way. I don't feel like I could.
> Q. I appreciate your honesty. Your Honor, the State would challenge Mr. Stitt for cause.
> MR. STENNETT: I object to this, Your Honor. He has already been accepted by the State and by me, by the defendant.
>
> Q. Your Honor, I think in the questioning of Mr. Stitt -
> A. I would like to say this, if I am in order. Now, I have never sat on a jury before. Now, I must say that it is quite a bit confusing. It is something new to me. I may be saying something that, in other words, if I was to hear the case, but, now, as far as the death penalty, I don't know whether I could go along with it or not, no matter what the law.
> (R p 41)

The Court advised juror Stitt of his duty to follow the law, but the juror asked to be excused. The court refused the State's challenge for cause and excused the juror "in [his] discretion and at the request of the juror." The juror's answers were unequivocal - irrespective of what the evidence might show, he would not vote for a first-degree conviction knowing that the death penalty would result from the verdict.

The record does not support the argument that juror Stitt was removed from the jury on account of his race--or even show what his race was. The law does not, however, give petitioner the right to have a member of his own race on the petit jury, but requires a showing of an arbitrary and systematic exclusion of blacks. As the Supreme Court of North Carolina said in State v. Noell, 284 N.C. 670, 682, 683, 202 S.E.2d 750, 758, 759 (1974):

> Defendant's mere showing that all Negroes in this case were challenged by the solicitor is not sufficient to establish a prima facie case of an arbitary and systematic exclusion of Negroes. The record is silent about any prior instances in which the solicitor challenged Negroes from the jury. The defendant has the burden of showing such arbitary and systematic exclusion, and he has failed to carry that burden.
>
> **********
>
> A defendant has no right to be tried by jury containing members of his own race or even to have a respresentative of his own race to serve on the jury. Defendant does have a right to be tried by a jury from which members of his own race have not been systematically and arbitarily excluded. The burden is upon the defendant, however, to establish racial discrimination in the composition of the jury. State v. Cornell, 281 N.C. 20, 187 S.E.2d 768 (1972).

III

THE COURT SHOULD NOT GRANT CERTIORARI TO DETERMINE WHETHER THE TRIAL COURT ERRED IN DENYING PETITIONER'S MOTION FOR JUDGMENT AS IN THE CASE OF NONSUIT.

The motion for judgment as in the case of nonsuit is the same as a demurrer to the evidence, N. C. Gen. Stat. § 15-173, or a motion to dismiss the indictment, State v. Cooper, 275 N.C. 283, 167 S.E.2d 266 (1969), or a motion for a directed verdict of not guilty, State v. Kolton, 284 N.C. 391, 200 S.E.2d 612 (1973). The motion challenges the sufficiency of the State's evidence to warrant its submission to the jury and to support a verdict of guilty of the offense charged, State v. Vaughan, 268 N.C. 105, 150 S.E.2d 31 (1966). The only question which petitioner sought to raise in connection with the assignment of error was a question of the sufficiency of the evidence of the identity of petitioner as the perpetrator of the murder. The evidence of identity in this case is strong. Mrs. Wood, the victim's wife, who was present at the scene of the killing and testified as to her opportunity to observe the killer identified petitioner in court as the killer. She had participated in two out of court identifications. The first out of court identification involved the selection of a photograph from a group of about fifteen photographs. Mrs. Wood, selected a photograph of petitioner. The second of these was a line up identification. There Mrs. Wood identified another person as the perpetrator of the offense. She explained in some detail the reasons for her misidentification, as the North Carolina Supreme Court's opinion explains, 220 S.E.2d 302. As the opinion of the State Supreme Court explains, there was also strong circumstantial identification in the testimony of Evelyn Byers 220 S.E.2d 302. Petitioner raises no question of a violation of his Constitutional rights at either out of court identification. No Constitutional question being raised, it is necessary for this Court to deny review to this question.

IV

THE COURT SHOULD NOT GRANT CERTIORARI TO DETERMINE WHETHER THE TRIAL COURT SHOULD HAVE SUSTAINED PETITIONER'S OBJECTIONS TO QUESTIONS ASKED OF PETITIONER'S WITNESSES BY THE STATE.

In the State Supreme Court petitioner argued that the trial court should have sustained certain defense objections to questions asked of the witness John Thomas Alford and of petitioner by the State on cross-examination. The questions asked are set forth in the State Supreme Court's opinion, 220 S.E.2d at 298, 299 as well as the reasons that the trial court was not required to sustain those objections. The petitioner has not shown any theory, in the State Supreme Court or in his petition which indicates an abridgement of any constitutional right by the overruling of his objections, wherefore petitioner has presented no question which this Court may review.

V

THE COURT SHOULD NOT GRANT CERIORARI TO DETERMINE WHETHER THE TRIAL COURT IMPROPERLY DENIED PETITIONER'S MOTION IN ARREST OF JUDGMENT.

The petitioner's motion in arrest of judgment was bottomed on the theory that the death penalty imposed on the petitioner is a cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments to the Constitution of the United States. The Supreme Court of North Carolina, having recently decided in exhaustive opinions in State v. Waddell, 282 N.C. 431, 194 S.E.2d 19 (1973) and State v. Jarrette, 284 N.C. 670, 202 S.E.2d 750 (1974) that the death penalty is neither cruel nor unusual in the Constitutional sense, ruled that it was not error to deny the motion. Pending now before this Court is Fowler v. North Carolina, No. 73-7031, cert. granted 419 U.S. 963 (1974), reargument ordered (June 23, 1975) 43 U.S.L.W. 3674 and Woodson v. North Carolina, No. 75-5491 (cert. granted January 22, 1976) both of which pose the identical issue sought to be raised here. There is no possible position which this petitioner could take which cannot be taken by those petitioners, and no valid purpose would be served by granting further review in the present case.

CONCLUSION

For the reasons given, Respondent, the State of North Carolina, respectfully submits that certiorari should be denied.

Respectfully submitted this the 12th day of February, 1976.

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CERTIFICATE OF SERVICE

The undersigned member of the Bar of the Supreme Court of the United States does hereby certify that he has served a copy of the foregoing BRIEF OF RESPONDENT, STATE OF NORTH CAROLINA IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI on petitioner by depositing the same in the United States Mail at Raleigh, North Carolina, first class postage prepaid, addressed to:

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Larry Alexander Waddell
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This the 12th day of February, 1976.

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